SUPREME COURT, U. S.

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1966**

## No. 250

LLOYD ELDON MILLER, JR.,

*Petitioner,*

—VS.—

FRANK J. PATE, Warden of the Illinois State Penitentiary, Joliet, Illinois,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR PETITIONER

### Proceedings Below

In 1956, petitioner, Lloyd Eldon Miller, Jr., relator, was convicted of murder and sentenced to death by the Circuit Court of Hancock County, Illinois. The conviction was affirmed by the Supreme Court of Illinois; *People* v. *Miller*, 13 Ill. 2d 84, 148 N.E. 2d 455 (1958).[1] In August, 1963, petitioner sought commutation before the Illinois Pardon

[1] This opinion and other relevant opinions are reproduced in an appendix in a separate acco binder. Nine copies were supplied with the petition for certiorari.

and Parole Board. Commutation was denied but in the course of the hearings facts came to light for the first time which established that petitioner's constitutional rights had been seriously infringed in the 1956 trial. Execution was set for August 23. The Supreme Court of Illinois denied a stay to allow time for state court proceedings. Based upon these facts, however, petitioner filed a habeas corpus application in the United States District Court for the Northern District of Illinois and obtained a stay seven hours before he was to die. After a trial on the merits in the District Court, petitioner was ordered retried within a limited time or released. 226 F. Supp. 541 (1963). The Seventh Circuit reversed on February 20, 1965, and denied a timely petition for rehearing on April 9, 1965, 342 F.2d 646 (1965).[2] A petition for certiorari filed on July 7, 1965 was granted on June 20, 1966.

## Jurisdiction

The jurisdiction of this Court is based on 28 U.S.C. Sec. 1254.

## Constitutional Provisions and Statute Involved

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

[2] There were other efforts at relief before the facts here relied on came to light. The chief attempt was by habeas corpus. *Miller* v. *Ragen*, 300 F.2d 414 (C.A. 7th, 1962), cert. den. 371 U.S. 898 (1962). (Mr. Justice Douglas dissented.)

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in part as follows:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## Questions Presented for Review

Is it a violation of the constitutional right to a fair trial guaranteed by the due process clause of the Fourteenth Amendment, by the right to counsel clause of the Sixth and by the compulsory process for witnesses clause of the Sixth for the prosecution:

1. (a) To suppress exculpatory physical evidence;

   (b) As a device to obtain a confession, while interrogating a prisoner, to inform him falsely that such physical evidence implicates him;

   (c) To represent falsely to the Court and the jury that stains on a crucial garment are blood stains when the stains were known to be paint?

2. (a) Knowingly to use as a key prosecution witness an untrustworthy person who subsequently admitted,

under oath, that her trial testimony was perjured;

(b) Knowingly to permit a key prosecution witness to lie on a material issue?

3. To obstruct defense counsel from interviewing prospective witnesses where the effect was to deprive petitioner of alibi witnesses?

4. To hold petitioner *incommunicado* for over 52 hours, without counsel, until the prosecutor obtained a confession, meanwhile refusing to permit petitioner to call his family and telling him falsely his family did not want to see him?

## Statement of the Case

The Court of Appeals set aside habeas corpus relief granted petitioner by the District Court.

The District Court had before it the 1956 trial proceedings and the Parole Board transcript. In addition, the Court took evidence. This full record has been certified to this Court.

A. *The Record*:

The volumes making up the record include the following:

1. Volumes I, II and III include:

(a) Record of the 1963 habeas corpus trial in the District Court in the case now here.

(b) The 1956 testimony of prosecution witness Betty Baldwin Curry, reprinted for convenience from the abstract filed in the Supreme Court of Illinois (II R. 701-722).

The 1956 testimony of defense witness and counsel William H. Malmgren (II R. 722-728), similarly reprinted impeaching her testimony.

(c) The August 1963 Pardon and Parole Board Hearing (II R. 728-1069 and III R. 1070-1185).

2. Volume IV, "Transcript of Record" (brown cover) printed for this Court includes:

(a) The relevant portions of the Abstract of Record of the 1956 trial as filed in the Supreme Court of Illinois (pp. 1-376).

(b) The 1965 opinion and orders of the Court of Appeals (pp. 377-393).

3. Volume V, Exhibits in Acco binder (nine copies supplied).

Exhibits introduced at the 1963 habeas corpus hearing are marked: "Pet. Ex." and "Resp. Ex.".

Exhibits at the 1956 trial were marked: "People's Ex. ....." and "Deft's Ex. ....."

B. *The Facts*:

The facts are:

(a) The hair.

On Saturday, November 26, 1955, at about 4:30 p.m. (IV R. 32), Janice May, an eight-year-old girl, was found seriously injured under a mining car near a railroad track in Canton, Illinois. She was taken to a hospital where she

died at 5:47 p.m. (IV R. 37). At 6:20 p.m. Dr. Raymond J. Mercey, a licensed physician and surgeon (IV R. 38) and county coroner, examined the body while still on the operating table. At 2:00 p.m. on November 28, Forrest Litterly, a chemist at the Illinois State Bureau of Criminal Identification in Springfield, received a vial bearing the notations "Janice May—11/26/55, Dr. R.J.M." These were, respectively, the name of the deceased, date of the crime and autopsy, and initials of the coroner. The vial contained "two rolled Kleenex used to obtain a vaginal smear from Janice May. On one of the Kleenex a hair was found" (Report of Forrest Litterly, dated December 7, 1955) (V R. Pet. Ex. 6).

On Monday, November 28, 1955, at 8:00 p.m. petitioner was arrested (IV R. 152). The next day (IV R. 90) the police took a sample of his pubic hair which was delivered to Litterly at 6:00 p.m. on November 29 (V R. Pet. Ex. 6, p. 2). Litterly's report states, page 3, that he compared microscopically the hair on the Kleenex with the sample of petitioner's pubic hair. Litterly's report then concludes:

> "No similar characteristics between the two hair samples were observed and it is the opinion of the examiner that the common origin of the two hair samples is not probable."

Litterly was a prosecution witness at the 1956 trial. He was not, however, asked by the prosecution to inform the Court or jury of the facts regarding the hair. His testimony was confined to other matters (see (b) below). The prosecution never revealed to the Court or jury at the 1956 trial that it had determined that the hair found in the vagina of the deceased was not petitioner's.

Petitioner testified at the 1956 trial before the Court that he was shown the hairs on the night of November 29-30 "in a microscope room" and was told by the police that the hair belonged to him (IV R. 95). This testimony was never denied by the prosecution.

On May 9, 1956, four months before the September trial, petitioner moved for permission to make a scientific examination of the physical evidence in the hands of the prosecutor (IV R. 2). This motion was denied (I R. 194).

For the views of the Supreme Court of Illinois affirming the denial see 148 N.E. 2d 455 at 469.

Thus, not until 1963 did petitioner learn the facts regarding the hair. Shortly before trial in the District Court the prosecution produced Litterly's 1955 report in response to a subpoena duces tecum. Petitioner then learned for the first time that the prosecution knew the hair was not his and had lied to him regarding it during the interrogation preceding the confession.

(b) The jockey shorts.

On November 29, 1955, the police found a heavily stained pair of jockey shorts in the Van Buren flats, an abandoned building, in Canton (IV R. 161) and a jacket in a creek (IV R. 159). The confession dated December 1, states that the shorts and jacket had been discarded in the places where the police had previously found such garments (IV R. 145-6).

At the 1956 trial Litterly testified that the "staining material" on the shorts was blood of Type A (IV R. 167). The prosecution sought to link it to the deceased by hearsay

testimony (IV R. 16) at the 1956 trial that Janice May had Type A blood (IV R. 16). The prosecution knew, in 1956, that the testimony was hearsay (I R. 100-3) but did not disclose this fact. Forty-two percent of all persons have Type A blood (IV R. 168).

At the hearing in the District Court, petitioner for the first time was able to obtain a court order authorizing a scientific examination of the physical evidence by an expert of his selection, Mr. James Martin. This expert established that all the heavy stains were, in fact, paint, not blood. Further, the expert was unable to find any evidence of blood on the shorts (II R. 624-631).

Review of documents produced in the District Court pursuant to the subpoena duces tecum revealed a police memorandum discussing the paint on the shorts, and theorizing how it came to be there. In the District Court the prosecution admitted that in 1956 it had known of the paint (II R. 580).

Ownership of the shorts was sharply disputed at the 1956 trial.[3] Petitioner maintained that he wore boxer shorts, not jockey shorts, and supported his contention with substantial evidence. The question was whether the jockey shorts were petitioner's or a garment abandoned in the "flats" having no connection with the crime.

(c) Betty Baldwin Curry.

The principal witness for the prosecution in the 1956 trial was Betty Baldwin, now Mrs. Betty Baldwin Curry. In

[3] In the District Court, a man with experience in men's clothing, testified that the jockey shorts would have been too small to fit petitioner and that they would have been extremely tight and uncomfortable (I R. 181).

1956 her testimony was that on the night of November 26, 1955, she had ridden as a passenger in petitioner's taxicab from Canton to St. David and that during the course of that trip petitioner had admitted the crime to her. Her 1956 testimony is re-printed in II R. 701-722.

In the District Court, Mrs. Curry recanted completely her 1956 testimony, stating that she had lied on that occasion. She related in detail her interviews with the police following the crime, the manner in which she came to give a false story and her subsequent abortive efforts to retract prior to her appearance on the stand.

In the District Court, through discovery and through testimony of prosecution witnesses, petitioner learned for the first time the facts related below regarding Betty Baldwin Curry, all of which were known to the prosecution before the 1956 trial. These facts impugn her credibility. None of these facts were revealed to court or jury.

1. In February, 1956, about seven months before the trial, Betty Baldwin Curry told the prosecution a lengthy story related to the delivery and sale of narcotics. The authorities investigated the tale and concluded, correctly, that the story was false[4] (I R. 419) (V R. Pet. Ex. 5).

2. In March, 1956, Betty Baldwin Curry threatened to leave town. The prosecution used "extra-legal methods" (II R. 556), including jailing her for a time (I R. 460), to prevent her from doing so.

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[4] In the District Court, in 1963, the prosecution referred to a memorandum in the files of the State Bureau of Criminal Identification—prepared by James Christensen (I R. 420). This memorandum, not put in evidence, summarizes Mrs. Curry's statement to Mr. Christensen.

3. In July, 1956 Betty Baldwin Curry gave a false affidavit to the prosecution charging that defense counsel had threatened her unless she testified favorably to the defense at the trial (I R. 453-455). She falsely told the prosecution that defense counsel had offered her $10,000 if she would help get petitioner off (I R. 455).

4. After the taxi ride with petitioner, when petitioner supposedly confessed the crime to her, she did not report to the police but after she left petitioner, spent the night with a man she had just met (I R. 266, 268, 269) (V R. Pet. Group Ex. 2).

5. For some time after making her statement to the police, Betty Baldwin Curry lived on cash received from the sheriff's office and later on a job obtained for her by the sheriff (I R. 286-290).

6. A few days before the trial, in September, 1956, the prosecution falsely told Mrs. Curry that possibly she was deeply involved with petitioner because they could not prove where she was at the time petitioner left Canton. This was false because the facts in (4) above were known to the prosecution (I R. 267).

7. Two women deputy sheriffs (II R. 599) took Mrs. Curry to Carthage to testify in September, 1956. No other witness at the trial was so treated (II R. 600). The reason was, as explained by Fulton County Sheriff Vincent Ball, "We were trying to treat her with all the courtesy that was possible through our office" (II R. 600).

Just before Mrs. Curry testified in 1956, the prosecution moved, outside the presence of the jury, to call her as a

court's witness. This motion was denied (IV R. 159-60). None of the foregoing facts were disclosed to the court as ground for this motion.

8. Immediately after giving her name, address and occupation, Betty Baldwin Curry falsely testified that she had known petitioner for approximately two years. In fact she had known petitioner for 5 weeks before November 26 (I R. 94, 247, 258, 245) and the prosecution had her signed statement of November 30 to this effect. This falsehood was not revealed by the prosecution to the court or jury (I R. 94-5).

(d) Petitioner's landlady and other alibi witnesses.

In August, 1963, before the Parole Board commutation hearing, petitioner and the prosecution produced evidence bearing on the issues at bar. That evidence was admitted by the District Court. The prosecution fixed the crime at 4:00 P.M. (II R. 882). Petitioner's defense was that he worked the night before the crime and that he was in his room during the entire afternoon of November 26 until he left at 4:30 P.M.

Respecting petitioner's alibi, a key person was Mrs. Alice Baxter, petitioner's landlady.

Mr. William Malmgren, then petitioner's attorney, interviewed this witness before the 1956 trial but before covering with her all topics of inquiry, she told him that Mr. Blaine Ramsey, the State's Attorney had told her she didn't have to talk to him (II R. 943). Mr. Malmgren was never able to learn more. At the 1956 trial the defense sought leave to call Mrs. Baxter as a court's witness (IV R. 180-1) but would not meet the Court's condition that

the defense state she was unreliable. Without knowing what her evidence would be, the defense could not afford to call her and risk being bound by her testimony (I R. 215).

During the Parole Board hearing in 1963 petitioner learned the full story about the State's Attorney's representations to Mrs. Baxter and the testimony which Mrs. Baxter would have told if she had been called in 1956. On cross-examination Mr. Ramsey stated that he told "many, many witnesses, including Mrs. Baxter," "they had a constitutional right not to talk to anyone and they should make up their own mind whether they should or not." Further, he testified that he advised some persons who had been interviewed by counsel for the defense to say, "I already told you what I know. I'll tell the rest in court" (III R. 1098).

The following testimony of Mrs. Baxter was thus obtained for the first time at the commutation hearing:

Petitioner could not have committed the murder at 4:00 P.M. because he was in his room until 4:30 P.M. and the scene of the crime was about 6 or 7 blocks away (II R. 834).

At 4:30 P.M. petitioner came downstairs and Mrs. Baxter then requested petitioner to go to Lewis Pharmacy to have a prescription refilled (II R. 820). He took the prescription and the money, was gone about half an hour to 45 minutes, returned with the prescription and the change, declined to take pay for his trouble, and left. Mrs. Baxter further corroborated the testimony of petitioner (IV R. 273) and his mother, Mrs. Jewel Miller (IV R. 224), that petitioner always wore boxer-type shorts. Jockey-type shorts were the type found in the Van Buren flats and admitted at the 1956 trial. While in court, she saw the jacket found in the creek. She had never seen petitioner wear such a jacket (II R. 822).

Both Rebecca Watters (II R. 863) and Adrian Watters (II R. 880), then both children, corroborated their grandmother's testimony. The event was fixed in Rebecca's memory (II R. 864). Mr. Baxter was not available as a witness before the Parole Board (II R. 816) but testified in the District Court (I R. 184). His testimony was substantially the same as that of his wife and grandchildren.

(e). The visit to the pharmacy.

It was the prosecution's theory that between 5:15 (IV R. 179) and 5:45 P.M. petitioner picked up clothing at a cleaner's, returned to his room, changed clothes, tried to retrieve the shorts in the abandoned building, threw the bloody garments in the boxcar of a train passing Maple Street,[5] and returned to his room. See IV R. 145 for the alleged events themselves ending at 5:45 P.M.

No testimony was presented by the prosecution that during that half hour, petitioner was in a drug store obtaining a prescription for his landlady. Yet the prosecution knew this to be true.

Before the Parole Board in 1963 the prosecution called as its witness Edward R. Lewis, Jr., of Lewis Pharmacy. He submitted an affidavit that petitioner was in the store to fill a prescription at 5:25 P.M. (II R. 975) and left the store about 5:30 P.M. (II R. 986).

In response to a question by a member of the Parole Board whether petitioner was distressed or acting unnat-

[5] No train passed this point between 5:15 and 5:45 p.m. (IV R. 204, 210). Despite intensive search, no clothing was ever found in a boxcar, nor in the river at Pekin where, the confession says, pants and a shirt were thrown.

urally, Mr. Lewis said, "No, I was much too busy to even—he was just like any other customer that would come in and would look like anyone else" (II R. 984).

Mr. Lewis related the above facts to the prosecution almost immediately after the crime but was not called as a prosecution witness.

Defense counsel also interviewed Mr. Lewis shortly after the crime. To Mr. Malmgren, Mr. Lewis said that "He (Lewis) had no personal knowledge of Mr. Lloyd Eldon Miller having entered the store . . ." (II R. 945)

(f) The Confession:

1. *The interrogation.* Petitioner was arrested about 8:30 P.M. on November 28, 1955, in Danville, Illinois (IV R. 152). Petitioner was taken from Danville to Springfield, Illinois, arriving about 2:00 A.M. and lodged in the Sangamon County jail. At 5:00 P.M. on November 29 at the Illinois Bureau of Criminal Investigation in Springfield a specimen of his pubic hair was taken (IV R. 90). Petitioner was then questioned (with one supper break) until long after midnight. According to the prosecution, questioning continued until about 2:00 A.M. (IV R. 69); according to petitioner, about 3:00 A.M. (IV R. 93). The following morning, Wednesday, November 30, defendant again was awakened at 6:00 A.M. and was placed in the bull-pen with other prisoners. During the day he was fingerprinted and placed in a line-up. After a 4:30 P.M. supper, he was taken back to the State Bureau where he was questioned from about 5:30 P.M. until about 12:15 A.M. (IV R. 93-95) at which time he signed a confession, written out in longhand by James Christensen, the Superintendent of the State Bureau of Criminal Investigation.

It is unquestioned that a lie detector test was given petitioner. According to the prosecution, the test was given between 9:30 P.M. and 1:00 A.M., November 29. According to petitioner, it was some time during the evening of November 30, immediately preceding the confession (IV R. 95). Petitioner testified that he received coffee (IV R. 99) but no food during the November 30 interrogation until after he had signed the confession (IV R. 100). According to the prosecution, however, there was a break between 8:30 and 9:30 P.M. to permit petitioner to eat (IV R. 69).

2. *Request to see family denied.* During the interrogation, petitioner made numerous requests to see his family, and on numerous occasions he was told that his mother and father wanted to have nothing to do with him. Thus, for example, petitioner testified: "During the evening of November 29th I asked Virgil Ball if I could see my folks. I demanded to see my folks. He wouldn't let me see my folks. He said that 'Your mother and dad said they didn't want to have anything to do with you.' I said, 'You are lying. I know my mother and dad'" (IV R. 93). Before the jury petitioner put it this way: "I says, 'Virgil,' I says, 'You are lying.' I says, 'I know my parents'" (IV R. 274).

The request was repeated on the evening of November 30: "I demanded of Virgil Ball to see my folks on the evening of November 30th. He told me my folks didn't want to have nothing to do with me" (IV R. 97). "I asked Sheriff Ball, I demanded to see my folks. He says, 'No.' He says they don't want to have nothing to do with me. He says, 'Anyway, you cannot see them.' And I says, 'I am innocent of this crime,' and I says, 'You people are going to pay for this, accusing me of this crime,' so he got mad and he hit me on the shoulder with his fist. On the evening

of November 30th no one advised me or asked me whether I wanted an attorney" (IV R. 100). "When he was in the room with me there before 11:00, I demanded him that I would see my parents and he says, 'No.' 'Your parents don't want to have nothing to do with you,' and 'Anyway, you can't see them.' I said, 'That is not the truth'" (IV R. 106-7).

3. *False statement about the hair.* It was on the night of November 30 that Miller was told that a hair had been found in the vagina of Janice May, and was told falsely that the hair matched a sample of his pubic hair. Petitioner's testimony at this point, is as follows: "I was in this little room at all times on the evening of November 30th except for one time which I demanded to look through the microscope my own self because they said these hairs belonged to me. Mr. Lynch made a statement to me that certain hairs belonged to me. He showed me some hairs there. I demanded to go back there and he took me there; back in the laboratory in a small room which appeared to me to be a microscope room and I looked there and said 'Them hairs don't match! I says, 'them hairs don't belong to me.' And this chemist just looked at me and smiled" (IV R. 95). Petitioner confessed orally shortly after this incident, and, at approximately 12:15 A.M. Thursday, December 1, signed a written confession. He was taken to the County Jail at Pekin where he immediately repudiated the confession to the sheriff (IV R. 284). (Petitioner's testimony on this point was not contradicted by the prosecution.) From that day to this, petitioner has consistently repudiated this confession and denied his guilt.

4. *Prosecution statements to petitioner that they thought him mentally ill.* On numerous occasions throughout his

interrogation on the nights of November 29 and November 30, the police led the petitioner to believe that they thought him to be mentally unsound and that if he confessed he would receive treatment as a mentally ill person. For example, James Christensen, Superintendent of the Illinois State Bureau of Identification and Investigation (IV R. 42) testifying as to the confession outside the presence of the jury, stated that on the night of November 30, just before the alleged oral confession, he informed defendant (IV R. 47-8), "I said that it may have been possible that he was over emotional. He said that he was. I said possibly he might have needed treatment and possibly had he had treatment these things may never have happened. That was the trend of the conversation." In the presence of the jury, Mr. Christensen testified (IV R. 129), " . . . I also said that possibly he may have been overemotional. Also if he might have confided in someone—quite often in cases of this nature, if people would confide with someone, incidents would be prevented, and also said it might have been possible that he could have needed treatment. And I said, 'At times possibly you are overemotional in some respects.' Then he said that was true, he was overemotional in one respect in particular . . . "

Kenneth Lindsey, Chief of Police of Canton, testifying to the same event, used almost the same words (IV R. 137) " . . . Mr. Christensen said, 'Lloyd, would it be possible that you were overemotional?' Mr. Miller said, 'Yes.' Mr. Christensen said, 'If you received some treatment it would be possible this thing would never have happened,' and Mr. Miller said, 'Yes' . . . " Petitioner's version of the discussion differs in some respects but the essential meaning is the same. He testified that Virgil Ball, Sheriff of Fulton

County (IV R. 40) said to him on the preceding evening, November 29, "Lloyd, why don't you admit this crime so we can send you to a mental institution?" (IV R. 93), and repeated the statement in substance on November 30 (IV R. 95 and 107).

Immediately after signing the confession, defendant was taken to the Tazewell County Jail, where he was examined by Dr. Lloyd F. Tetor. The reason was, as Virgil Ball put it (IV R. 158) that he was in a frame of mind where he might take his own life.

## Summary of the Argument

In violation of the prior holding of this Court and of other courts, the prosecution in a capital case wrongfully suppressed exonerating evidence. It had in its possession a scientific report that the hair found in the vagina of the deceased did not match the pubic hair of petitioner. To induce petitioner to confess, the police falsely told him the hair found in the body matched his. The prosecution wrongfully represented to judge and jury a pair of shorts as blood stained, when it knew the stains were paint. Thus it sought to influence the jury against petitioner. Moreover, it avoided the embarrassing problem of explaining how shorts supposedly abandoned in haste became paint soaked.

The prosecution, knowing that a scientific examination of the evidence would uncover the above facts, wrongfully opposed pre-trial efforts of petitioner to have such an examination made. Such opposition on the facts here, was a constitutional deprivation.

Further in violation of petitioner's constitutional rights, the prosecution called as its chief witness Betty Baldwin

Curry who testified to an alleged confession to her by petitioner. The prosecution knew that on the stand she commenced her testimony with the falsehood that she had known petitioner for two years, when she had only known him for five weeks.

Moreover, the prosecution knew that the witness was unworthy of belief: she had related to it a false tale about narcotics and had made false accusation against petitioner's counsel. The prosecution wrongly intimidated this witness by an illegal arrest and by threats against her. (After petitioner's counsel interviewed this witness, the prosecution accepted her irresponsible allegation as a basis for instituting, without notice, contempt proceedings against him, made returnable on the very eve of trial. (I R. 195-7. See *People* v. *Miller*, 148 N.E. 2d at 470).) It revealed its own want of confidence in her by seeking to call her as a court witness.

The prosecution, additionally, in violation of petitioner's right to counsel and to due process, obstructed petitioner's counsel from interviewing prospective defense witnesses and thus deprived petitioner of four vital alibi witnesses.

The confession obtained from petitioner was a result of deceit and coercion. We now know about the lie regarding the hair. This falsehood significantly weakened petitioner's will to resist his interrogators. Petitioner was further weakened by two long periods of interrogation while being held incommunicado. He was told falsely that his parents wished to have nothing to do with him, while at that very time his parents were making efforts to find and talk to him. He was told falsely that the police believed him mentally ill and that if he confessed, he would be treated accordingly. Yet at trial, when petitioner sought to introduce psychiatric

evidence as to his mental state, and the effect upon him of these prosecution devices (then known to petitioner), the prosecution blocked the way.

The prosecution case rested fundamentally on the confession. The constitutional violations recited above obscured the anomalies and gross discrepancies between the confession and known facts which discredit the validity of the confession.

## ARGUMENT

### I.

**In Violation of Petitioner's Right to Due Process, the Prosecution Knowingly**

**(1) Suppressed Exculpatory Physical Evidence.**

**(2) Barred Defense Counsel From Making Its Own Examination of the Physical Evidence to Learn the Truth.**

(a) Concealment of the hair.

This capital case presents a nearly unbelievable spectacle: a murder and sexual assault is committed on a child. The authorities immediately after death using a paper tissue take a vaginal smear from the child. There is a hair on the tissue. Petitioner is a suspect. The authorities make a scientific comparison of the hair and one of petitioner's pubic hairs. They are found not to match. Nonetheless, to induce confession petitioner is told falsely that the hairs do match and petitioner is tried for the crime. His counsel move to make a scientific examination of the physical evidence. The prosecution resists. The trial court denies the defense motion and the Supreme Court of Illinois affirms.

Through the discovery processes of the District Court, the facts of suppression are revealed. Yet the Court of Appeals below refuses to hold that petitioner's constitutional right to due process has been violated.

Such decision is directly contrary to the decision of this Court in *Brady* v. *Maryland*, 373 U.S. 83 (1963). There, in Brady's trial for murder, the prosecution suppressed a statement of an accomplice that the accomplice had done the actual shooting. This Court said, 373 U.S. at 87:

> ". . . the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

*Brady* cited with approval two Third Circuit Court decisions: *United States ex rel. Thompson* v. *Dye*, 221 F.2d 763, *cert. den.* 350 U.S. 875 (1955) (held unconstitutional for prosecution to permit officer to testify that prisoner was not drunk when arrested when prosecution had contrary information from other officers. The issue went to intent.) and *United States ex rel. Almeida* v. *Baldi*, 195 F.2d 815 (1952), *cert. den.* 345 U.S. 904 (1953) (Commonwealth produced evidence tending to show that Almeida fired a shot fatal to a police officer. It had ballistic proof, however, that the officer was killed by another policeman. The Court concluded that Almeida "had been overreached and . . . denied due process. . . . " 195 F.2d at 819). See also *U.S. ex rel. Hough* v. *Maroney*, 247 F. Supp. 767 (1965). (Companion case. Relief granted another defendant.)

Other similar holdings are *Ashley* v. *Texas*, 319 F.2d 80 (C.A. 5th, 1963), *cert. den.* 375 U.S. 931 (1963) (State failed

to reveal to defendant that before trial he had been found mentally incompetent by a third set of doctors after two prior sets had found him sane); *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135 (C.A. 2nd, 1964). (Defendant convicted of robbery on testimony of eyewitnesses. After trial defendant's counsel learned that two other eyewitnesses questioned by police had categorically denied that defendant was the robber); *Barbee* v. *Warden*, 331 F.2d 842 (C.A. 4th, 1964) (Defendant convicted of shooting a police officer. Prosecution witnesses identified defendant's revolver as "similar" to the one used in the shooting. The prosecution, however, knew it was not the weapon and that relevant fingerprints were not defendant's); *Turner* v. *Ward*, 321 F.2d 918 (C.A. 10th, 1963) (Suppression of nature of sex attacks).

Another Third Circuit decision is *U.S. ex rel., Butler* v. *Maroney*, 319 F.2d 622 (1963). The prosecution during the trial as to guilt, refused to permit the defendant to examine the statement of the driver that a struggle had preceded the shooting. After a conviction of first degree murder, the statement was introduced by the State at the penalty trial.

This the Third Circuit held, was a violation of due process, because had the statement been revealed "many factors helpful to the appellant's case, challenging, if not materially weakening, [the driver's] account of the fatal firing of the shot which might have resulted in appellant's conviction of a lesser degree of crime" (319 Fed. 2d 627).

Recently, the District of Columbia Circuit, in a bribery case, granted post conviction relief where the prosecution failed to reveal to the defense before trial that bank officers

had no knowledge of a key incident. *Levin* v. *Katzenbach*, 363 F.2d 287 (1966).

*McMullen* v. *Maxwell*, 3 Ohio St. 2d 160, 209 N.E. 2d 449 (1965) is a state court case where relief was granted because the prosecution suppressed a ballistics report that defendant's gun was not the murder weapon.

For District Court cases to the same effect see *Application of Kapatos*, 208 Fed. Supp. 883 (N.Y., 1962) (Suppression of witness statement that defendant not the murderer); and *United States ex rel. Montgomery* v. *Ragen*, 86 F. Supp 382 (1949) (Rape case. Suppression of doctor's statement that he found no evidence of rape and that the girl was a virgin.)

*Brady, Thompson, Almeida, Ashley, Meers* and *Barbee*, all were cited to the Court of Appeals. It did not discuss or even mention a single one. Instead it indulged in conjecture (342 F.2d at 652, IV R. 384), postulating various theories disconnecting the hair from the crime (e.g. that the hair came from "divers doctors"). This approach we think is shocking. (1) The Court of Appeals erroneously purported to sit as a Hancock County jury. (2) On the evidence its conclusions seem most remote. Consider these facts:

The vaginal smear on the tissue was taken by the County Coroner, a physician (IV R. 38), during an examination of the body begun 37 minutes after death while the body was still on the operating table. The notation on the container (IV R. Pet. Ex. 6) was "Janice May, 11/26/55, Dr. R.J.M."[6]

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[6] The Court of Appeals erroneously states the initials as "Dr. R.J.H." (342 F.2d at 652).

—clearly the initials of the coroner, Dr. Raymond J. Mercey.

Had the existence of the container and the label been known to the defense in 1956, no doubt Dr. Mercey would have been asked to confirm the facts about its discovery stated by Litterly.

Janice May was eight years old. The finding of a human hair on a tissue used to obtain a vaginal smear immediately after she had been attacked sexually, in the absence of contrary prosecution evidence, requires the conclusion that the hair was from her attacker. This was not a hair found on the *surface* of the body which might have been accidentally deposited by individuals handling the body. The defense was entitled to present to the jury the fact that the hair had been found and that it was not petitioner's.

(b) The false statement to petitioner that the hair was his.

A lie was told petitioner to weaken his will to resist his interrogators. While under questioning, he was told that the hair found in the body of the deceased matched his pubic hair. This statement was false. The prosecution knew it was false or made it without bothering to ascertain the truth from Litterly, as part of its pressure tactic against petitioner.

We mention the point here because of its relation to (a). See Part IV for argument.

(c) Concealment of the fact that the shorts were paint-stained rather than blood-stained.

No doubt impressive evidence against petitioner was the so-called blood-stained shorts. As the exhibits have

been transmitted to this Court, we ask this Court to examine this garment (Pet. Ex. 9). In light of the record, one would assume that the shorts were indeed "blood-stained". In fact, Litterly's testimony in 1956 was that the "staining material" was Type A blood (IV R. 167). There is no question that defendant was deceived because on two occasions he referred to the shorts shown him with "dried blood" on them (IV R. 90, 96). Again availing himself of the discovery processes of the District Court, petitioner learned for the first time through an expert witness the shocking fact that the "blood-stained shorts" were not blood stained at all but were paint-stained shorts (See Statement of case (b)).[7]

The prosecution knew almost from the first that the stains were paint, not blood, and yet this fact was not revealed to court or jury. The jury was inflamed because it was led to believe that the stains were the blood of the child.

Further, the prosecution's theory was that petitioner, after committing the crime, hastily abandoned the "blood-stained" shorts. This theory fails to explain the paint. The prosecution, aware of this problem, prepared a memorandum which speculates as to how paint came on the garment.

We think, that at the least the prosecution had a duty to reveal the paint, to the court, jury and petitioner, for the prosecution had successfully blocked petitioner from access to the physical evidence and thereby precluded him from ascertaining the facts for himself.

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[7] It is questionable whether there is or was any blood on the shorts (II R. 642).

The cases cited in subpart (a) are equally authoritative here. Thus, misrepresenting paint as blood is similar to the prosecution's representing—perhaps truthfully—that the murder weapon was "similar to" the defendant's—when it knew that defendant's gun, in fact, was not the murder weapon. *Barbee* v. *Warden,* 331 F.2d 842 (1964).

Ownership of the shorts was a sharply contested issue at the trial (see Statement of Facts, (b) *ante*). Petitioner vigorously denied that they were his. Had the jury known of the paint, and its unexplained presence, it might well have believed petitioner. His testimony would have been corroborated by Mrs. Alice Baxter (see Statement of Facts, (d)), his landlady, but for the prosecution's wrongful action in effectively depriving petitioner of her testimony.

The prosecution never bothered to try the shorts on petitioner (I R. 222), and with good reason, for it appears that the jockey shorts were too small to fit petitioner (see Statement of Facts, (b) *ante*).

There is one other factor to the shorts matter? Litterly testified in categorical fashion that the blood found on the shorts was type "A." Mrs. Jeanne May, mother of Janice May, testified categorically that her daughter had type "A" blood. The jury was led to infer that there was blood on the shorts, and that it was the child's blood. What the prosecution knew, but suppressed at the trial, was that Litterly in the Dec. 7, 1955 report stated only that the blood "was probably Group A" (V R. Pet. Ex. 6).

Thus, an expert witness for the prosecution made an unqualified statement on the stand after he had previously made a guarded statement in his report. Yet the prose-

cution made no effort to put the whole truth before the court and the jury. The Court of Appeals dismissed the matter as one of writing style (342 F.2d at 652), but failed to note that in the same report Litterly stated petitioner's blood type ("O") *without qualification* (Pet. Ex. 6). Hence the "probable" qualification was not merely a scientist's caution.

Here again, the prosecution indulged in the technique condemned in *Alcorta* v. *Texas*, 355 U.S. 28 (1957)—in reverse. Here there was a conscious overstatement (sureness of scientific opinion); there, conscious understatement (the witness had only a casual relationship with defendant's wife).

In the light of uncertainty of the expert witness regarding the blood type on the jockey shorts, the prosecution's knowing use of hearsay testimony (I R. 109-3) to establish the child's blood type takes on new significance (see Statement of Facts, (b) *ante*). There was no competent evidence as to the child's blood type and no sure evidence regarding the blood on the shorts. Thus, this key link in the prosecution's case collapses.

(d) The prosecution's refusal to permit scientific examination of physical evidence by defense counsel.

Months prior to the 1956 trial petitioner moved for permission to make a scientific examination of the physical evidence in the hands of the prosecution, the motion was denied, and the denial upheld by the Supreme Court of Illinois (Statement of Facts (a)) (see 148 N.E. 455 at 469) on the ground that there was no showing that the trial court abused its discretion. Proof of such abuse could not be made because the prosecution had concealed the very facts

petitioner needed to establish the necessity for such examination. We have shown above the duty of the prosecution to reveal evidence favorable to the prosecution. It follows that there is a duty not to impede the defense from learning for itself about favorable evidence.

It is difficult to imagine a case which demonstrates with more compelling force the need to permit a scientific examination of evidence in the hands of the prosecution. Consider the nearly unbelievable chain of events: Immediately after the crime, the State promptly utilized scientific aids in an effort to find the killer. It found a pair of shorts, the hair and the other physical evidence. It took a sample of petitioner's pubic hair. During the hard fought trial, it remained mute about the hair, and foisted a paint-soaked pair of shorts as blood soaked shorts upon judge and jury. By a chain of events which can only be described as providential, during the hearing before the Parole Board, facts came to light respecting other constitutional deprivations. A few hours before the petitioner's time for death, a federal judge, concluding that petitioner's case merited a hearing, granted a stay. At the hearing, petitioner for the first time since his arrest 8 years before, had an opportunity for discovery of evidence suppressed by the prosecution. He then learned the truth about the hair and the shorts.

*Brady* v. *Maryland*, 373 U.S. 83 (1963), cited in (a) above, *U. S. ex rel. Butler* v. *Maroney*, 319 F.2d 622 (C.A. 3rd, 1963), *Wiman* v. *Powell*, 293 F.2d 605 (C.A. 5th, 1961),[7a] *U. S. ex rel., Almeida* v. *Baldi*, 195 F.2d 815 (C.A. 3rd, 1952), *cert. den.* 345 U.S. 904 (1953), all are cases where the prosecution failed to produce information requested by

[7a] *Powell* v. *Wiman*, 287 F.2d 275 (1961 cited pp. 32 and 34) in an earlier phase of this case. See also *Ex parte Powell*, 361 U.S. 34 (1959).

the defense. In each case, had the request been granted, the evidence so obtained would have been beneficial to the defense. In each case, refusal to grant the request was held to be a violation of due process. See also *State* v. *Cook*, 43 N.J. 560, 206 A.2d 359 (1965) (defendant entitled to examine psychiatric report). Cf. *Trimble* v. *State*, 75 N.M. 183, 402 P.2d 162 (1965) (failure to return letter and tapes essential to defense).

The cases cited above show that the prosecution cannot remain silent or speak falsely at trial when asked by the defense about favorable evidence in its possession. How then can the prosecution impede the defense before trial when it seeks to examine for itself the physical evidence in the state's possession?

We need not, and do not contend for a constitutional right of criminal discovery coextensive with civil discovery practice.[7b]

We restrict our argument within the confines of the facts at bar. Every trial, and particularly every criminal trial, and most importantly every capital trial, ought to be a search for truth. The pursuit of this goal requires bringing to the task a wide range of scientific and technological skills. If an effective trial presentation is to be made, adequate pre-trial preparation is essential. Experts must be found. They must have time to study the matter at hand, to discuss the issues with counsel and to prepare to testify. But all of this presupposes access to the raw data, frequently, as here, in the possession of the prosecution.

We need at the criminal trial the resources of the scientific and technological community. In some instances scien-

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[7b] Cf. *Dennis* v. *U. S.*, 384 U.S. 855 (1966), Pt. III. ("... disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.")

tific investigation may produce evidence of guilt; in other cases, as here, of innocence. In any event, any defendant, especially one on trial for his life, ought to be able to learn in advance what the scientific facts are. The fortuitous circumstance that the evidence is in the hands of the prosecution should not deprive him of this valuable right.

The arguments traditionally asserted against criminal discovery have little relevance to discovery of scientific facts. Such facts cannot be threatened or intimidated. The perjury spectre seems particularly remote.

In any event, where, as here, the prosecution knows that the physical evidence in its possession will in fact aid the defense, then the right of the defendant to examine such evidence appears overwhelming.

## II.

**In Violation of Petitioner's Rights to Due Process, the Prosecution Called as Its Chief Witness a Person Known to It to Be Unworthy of Belief and Who Later Recanted Her Testimony.**

**In Violation of Petitioner's Rights to Due Process, the Prosecution Permitted This Witness to Lie on the Stand Regarding a Material Matter.**

Unquestionably the testimony of Mrs. Curry to the effect that petitioner had admitted the crime to her weighed heavily against petitioner and may well have been the deciding factor in the jury's mind.[8] The prior Court of Appeals' decision rests heavily on it (300 F.2d at 416, n. 2).

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[8] *Giles v. Maryland*, now pending before this court, O. T. 1966, No. 27, cert. gr. May 21, 1966, 383 U.S. 941, raises issues similar to the Mrs. Curry issue. Opinion below, 239 Md. 458, 212 Atl. 2d 101. (Failure of prosecutor in rape case to reveal that prosecutrix

The record is manifest that the prosecution knew in 1956 that Mrs. Curry was untrustworthy and nevertheless called her to the stand (see Statement of Facts, (c)).

Incident after incident had alerted the prosecution to her untrustworthiness. The actions of the authorities themselves before trial shout out knowledge of her character in 1955-56. In February, 1956, Mrs. Curry volunteered to the authorities a tale about delivery and sale of narcotics. The officials properly judged the story false. In July, 1956, she gave the prosecution a false affidavit that defense counsel had made threats to her unless she favored the defense in her testimony. At the same time she falsely charged counsel with a bribe offer. The prosecution, aware of her character, used "extra-legal" methods, including jailing to prevent her from leaving town. For a time, they gave her cash and later got her a job. Just before the trial in September, 1956, they told her falsely that she might be involved because they could not prove where she was the night of the crime. In fact, the prosecution knew that immediately after petitioner's purported confession to her, she spent the rest of the evening with a man she had just met. She was escorted to court by two bailiffs. Aware of her unreliability, the prosecution asked to have her called as a court's witness. The motion was denied, but the jury was not informed of the prosecution's want of confidence in her (IV R. 159-160).

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claimed she was again raped (by another man) shortly after incident for which defendant was on trial.)

*Thompson* v. *Minn.*, cert. gr., O. T. 1966, No. 144, is a related but distinguishable situation. There, after conviction of defendant for hiring murderer of wife, the murderer, contrary to his trial testimony, asserted he was not hired, and then at second hearing reaffirmed original testimony. See 139 N.W. 2d 490 at 515-6 (1966). There, apparently, there was no claim prosecution suppressed facts known to it before trial about the murderer.

This Court has not had occasion to consider whether the calling of an unreliable witness is, *per se*, a violation of due process under the Fourteenth Amendment. In *Mesarosh* v. *U. S.*, 352 U.S. 1, 77 S.Ct. 1 (1956), this Court set aside a conviction under the Smith Act, where after the trial the chief prosecution witness gave bizarre, unbelievable testimony before other tribunals and thus impugned the truthfulness of his trial testimony.

Petitioner's case is stronger, for here unreliability of the witness was known to the prosecution before trial and became further evident while she was on the stand. In a non-criminal matter this Court set aside a judgment where it later appeared based in part upon untrustworthy witnesses. *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956).

Since these were federal cases this Court could rest decision on its supervisory jurisdiction over the federal courts.

There is, however, authority in other courts that suppression of evidence affecting credibility is unconstitutional. One illustration is *Powell* v. *Wiman*, 287 F.2d 275 (C.A. 5th, 1961) where the state suppressed the fact that an accomplice who testified against defendant, had a long history of mental illness and restricted defense efforts to inquire into this matter. Another illustration is *Smallwood* v. *Warden*, 205 F. Supp. 325 (Md., 1962), a rape case, where the examining physician learned facts about the complaining witness which bore on the question whether she had consented. This evidence was not produced at the trial. In *U. S. ex rel. Jackson* v. *Rundle*, 219 F. Supp. 538 (1963) relief was given from a guilty plea induced in part by the statement of an alleged accomplice who was in fact mentally ill.

Once on the stand, Mrs. Curry began her testimony with a falsehood, known by the prosecution to be such: that she had known petitioner for *about two years* when the prosecution had her signed statement of November 30, stating that she had known petitioner *about five weeks.* This falsehood was material: If Mrs. Curry had known petitioner for two years, the jury could conclude that petitioner might confess to her, whereas the jury might be skeptical of such a statement to a stranger. Despite this patent perjury, the prosecution remained silent. Not until institution of the *habeas corpus* action, when for the first time petitioner had access to the discovery procedures of the federal court, did the facts regarding this deception come to light.

The Court of Appeals failed to heed the teaching of this Court that a conviction obtained by evidence, known to the prosecution to be false, is void and in violation of due process under the Fourteenth Amendment to the United States Constitution. *Napue* v. *Illinois,* 360 U.S. 264 (1959); *Mooney* v. *Holohan,* 294 U.S. 103 (1935). In *Napue,* a witness who was an alleged accomplice testified falsely to increase his credibility that he had received no promise of consideration in return for testifying against defendant.

This principle has been extended by this tribunal: it is the duty of the prosecutor to avoid half-truths or misleading statements, and to correct any testimony which is not completely and totally truthful. *Alcorta* v. *Texas,* 355 U.S. 28 (1957). There defendant admitted killing his wife when he surprised her kissing one Castilleja, claiming it was murder without malice. Castilleja testified that he had only a casual relationship with defendant's wife. In fact, Castilleja had informed the prosecution he had been intimate with her. The conviction was set aside.

*Powell* v. *Wiman*, 287 F.2d 275 (C.A. 5th, 1961) is authority also for the proposition that it is a due process deprivation to permit questionable testimony by an accomplice. There the accomplice testified that the defendant had joined him in committing a robbery in Alabama. The prosecution had in its files a statement signed by the accomplice that at that very time he and defendant were committing a robbery in Florida. It was unnecessary to establish which version was true—if either. The inconsistency itself destroyed the accomplice as a witness. There as here, the facts came to light when the District Court issued its subpoena.

In *Curran* v. *Delaware*, 259 F.2d 707 (C.A. 3rd, 1958), a rape conviction was set aside after a police officer falsely stated that only one statement had been taken from accused, when there had been others, which were destroyed by the police. The court said:

> " . . . the trial of a capital case, or indeed any other trial, no longer can be considered properly a game of wits and skill." 259 F.2d at 711.

It was precisely this principle that the Court below overlooked on this question and on many others.

The Court of Appeals attempted to dismiss the Betty Curry issue. It argues (342 F.2d at 649) that her credibility was assailed at the trial. So it was, and defended by the prosecution. But, and this is the nub: the prosecution was defending her credibility when it *knew* she was not worthy of belief. This was the constitutional violation. Further, testimonial exegesis about the "two years" lie helps nothing. Wasn't the jury entitled to assume two years meant two years of meaningful friendship? Wasn't that fairly implied?

The Court below relies heavily on its decision in *U. S. ex rel. Rooney* v. *Ragen*, 173 F.2d 668 (1949) (342 F.2d at 651). There at least there was no showing, as here, of prosecution use of known perjured testimony by the witness.

What marks this case off from *Rooney* is that here there were additional facts impeaching Mrs. Curry's reliability *known only to the prosecution* (e.g., the lies regarding narcotic sales). In any event, *Rooney* does not commend itself where life hangs in the balance.

The Court of Appeals' reliance on *Hysler* and *Cobb* is misplaced. *Hysler* v. *Florida*, 315 U.S. 411 (1942) (IV R. 382), held only that a hearing need not be granted on the allegations of a post trial petition. In *Cobb* v. *Hunter*, 167 F.2d 888 (C.A. 10th, 1948) (IV R. 382), there was no proof of the prosecution's knowledge of perjury.

## III.

**In Violation of Petitioner's Sixth Amendment Right to the Assistance of Counsel and to Due Process, the Prosecution Obstructed Defense Counsel From Interviewing Prospective Witnesses and Thus Deprived Petitioner of Four Alibi Witnesses.**

Petitioner's landlady, at the 1963 hearing before the Parole Board, confirmed petitioner's alibi that he was home at the time of the crime. Such testimony was not available to the defense in 1956, because Mr. Ramsey wrongfully informed Mrs. Baxter, before defense counsel had concluded interviewing her, that she had a "constitutional right" not to talk to counsel. The message as understood by Mrs. Baxter was, "You don't have to tell

him anything" (II R. 848). As a result, "I never did tell him anything" (II R. 848).

Mr. Ramsey's statement no doubt was wrong.[9] What Mr. Ramsey failed to say was that Mrs. Baxter undoubtedly had a constitutional right *to* speak to Mr. Malmgren. But we cannot view Mr. Ramsey's statement as a mere erroneous proposition of constitutional law. The implication clearly was, "You should not speak to Mr. Malmgren." Such conduct of the prosecution in a capital case is little short of reprehensible. The prosecution knew that in a criminal case the defense has no right to take discovery depositions. The prosecution knew, further, that the defense could not take the risk of calling a witness to the stand without knowing what her testimony would be. In fact, when petitioner sought to call Mrs. Baxter as a court witness, the prosecution objected. Hence, it was of crucial importance to the defense that they be allowed to interview fully every witness in advance.

Nor is that the end of the matter. Being cut off from Mrs. Baxter, the petitioner was deprived of the corroboration of her two grandchildren and her husband, all of whom subsequently testified in the District Court below and before the Parole Board.

The Court of Appeals' view (342 F.2d at 653-4) would require petitioner to call a Mrs. Baxter not knowing her testimony. If it had been adverse, the effect on the jury would have been catastrophic. Mr. Baxter and the grandchildren were unavailable at the trial because the prose-

[9] Criminal discovery rules if adopted could require a witness to speak just as civil discovery rules do. One has no "constitutional right" to refuse to speak where there is a right in the courts and the legislature to require him to speak.

cution impeded access to Mrs. Baxter. The Parole Board did not resolve a legal issue (see 342 F.2d at 653); rather testimony before the Parole Board was introduced in the District Court by stipulation to save court time.

We think that the conduct of the prosecution subverted the due process right to fair trial and the Sixth Amendment guarantee of the right to compulsory process for obtaining witnesses favorable to the accused and the right to counsel. Those rights are empty shells if the prosecution may cut off pre-trial interviews by discouraging the witness from talking.

This Court appears to have had no occasion to consider the scope of Sixth Amendment rights in this precise context. It is established that the confrontation clause (*Pointer* v. *Texas,* 380 U.S. 400 (1965)) and the right to counsel clause of the Sixth are part of due process under the Fourteenth. *Gideon* v. *Wainwright,* 372 U.S. 335, 83 S.Ct. 792 (1963). This case holds also that an indigent felony defendant has a right to be provided counsel. Effective, not a nominal, appointment is necessary. *Powell* v. *Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158 (1932). Recently a District Court discharged an indigent defendant where the government refused to furnish funds to enable appointed counsel to take a statement from the chief prosecution witness. *U. S.* v. *Germany,* 32 F.R.D. 421 (Ala. 1963).

Missouri granted a new trial to a defendant where his counsel was refused the right to interview an incarcerated prosecution witness. *State* v. *Berstein,* 372 S.W.2d 57 (1963).

Over fifty years ago the Supreme Court of Rhode Island held it prejudicial error for the trial court to criticize defendant's counsel for interviewing a state witness. It relied upon a state constitutional provision analogous to the Sixth and Fourteenth Amendments.

> "It would be a most unfortunate condition of affairs if a party to a suit, civil or criminal, should be permitted to monopolize the sources of evidence applicable to the case to use or not as might be deemed most advantageous." *State* v. *Papa,* 32 Rhode Island 453, 459, 80 Atl. 12, 15 (1911).

Other courts in varying situations have enunciated the principle that defendant should not be fettered in the interviewing of witnesses. *Wilson* v. *State,* 93 Georgia App. 229, 91 S.E.2d 201 (1955); *Walker* v. *Superior Court,* 155 Calif. App.2d 134, 139-141, 317 Pac.2d 130, 134 (1957) and *Schindler* v. *Superior Court,* 161 Calif. App.2d 513, 520, 327 Pac.2d 68, 73 (1958).

## IV.

**The Newly Discovered Lie to Petitioner About the Hair, Together With Other Acts of Coercion Render the Confession Involuntary and Hence Inadmissible.**

We are aware of this Court's holding in *Johnson* v. *New Jersey,* 384 U.S. 719 (1966) that *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) and *Miranda* v. *Arizona,* 384 U.S. 436 (1966) are not to be applied retroactively. As we understand *Johnson,* that case holds only that this court will not reverse summarily for pre-decision violation of the rules then announced. (See *Davis* v. *North Carolina,* 384 U.S. 907 (1966).)

But in *Davis* this Court examined the record before it and found that applying pre-*Miranda* rules a confession was involuntary. The Court said:

> "As we pointed out in *Johnson*, however, the non-retroactivity of the decision in *Miranda* does not affect the duty of courts to consider claims that a statement was taken in circumstances which violate the standards of voluntariness which had begun to evolve long prior to our decisions in *Miranda* and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). . . . .
>
> The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, the fact that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made. This factor has been recognized in several of our prior decisions dealing with standards of voluntariness. *Haynes* v. *Washington*, 373 U.S. 503, 510-511 (1963); *Culombe* v. *Connecticut*, 367 U.S. 568, 610 (1961); *Turner* v. *Pennsylvania*, 338 U.S. 62, 64 (1949). See also *Gallegos* v. *Colorado*, 370 U.S. 49, 54, 55 (1962). Thus, the fact Davis was never effectively advised of his rights gives added weight to the other circumstances described below which made his confessions involuntary."

It is our position that the confession is void as coerced judged by the pre-*Miranda* and *Escobedo* standards. We

consider first the lie to petitioner about the hair which we think adds a new dimension to the matter and then shall relate this falsehood to other acts of coercion employed to obtain a confession. (See Statement of Facts (f) for details regarding the confession.)

The reprehensible trick of the hair apparently was the device that finally broke the will of petitioner—the statement, now known to be false, that his pubic hair matched the hair found in the body of Janice May. It was shortly after this incident that petitioner confessed.

We know from Litterley's report (V R. Pet. Ex. 6), that the physical evidence with the hair found in the body (Item 6, p. 1) was delivered to him at 2:00 p. m. on November 28 (p. 1). Litterley received the sample of petitioner's pubic hair at 6:00 p. m. on November 29 (p. 2), that is shortly after the start of petitioner's interrogation. Thus at the time petitioner was told his hair matched that found in the body the prosecution knew that that statement was false, or made it without ascertaining its truth or falsity.

The matter took another twist at the trial: at the hearing before the court in the absence of the jury, petitioner testified regarding the statement to him by the police about this subject. By then, nearly a year had passed and the prosecution was unquestionably aware of Litterley's report, yet it stood silent, saying nothing. It did not deny the incident, nor did it tell the court of the police falsehood to petitioner. Thus the court was left to draw the wrong inference that in fact a hair matching petitioner's had been found in the body of the deceased. The warning of *Barbee* v. *Warden*, 331 F.2d 842 at 846 (C.A. 4th, 1964) is pertinent: "The cruelest lies are often told in silence."

This Court has stricken confessions where similar subterfuges were practiced by the prosecution. Thus, in *Spano* v. *New York,* 360 U.S. 315 (1959), the defendant called a police officer who had been a close boyhood friend and told him that he had shot a man who beat him in a bar fight and intended to give himself up. Defendant was arrested next day after the police officer reported the matter to his superiors. The superiors instructed the police officer to call the defendant, inform him that his first phone call had gotten him into trouble and play upon his sympathies to get him to confess to murder. After four such calls, the ruse succeeded. The court emphasized these facts among others in upsetting the conviction as a violation of due process. In *Leyra* v. *Denno,* 347 U.S. 556 (1954) this Court upset a murder conviction where the police, during the course of interrogation, informed defendant that a Dr. Helfand would give him medical relief for a sinus condition. In fact, Dr. Helfand was a psychiatrist. "For an hour and a half or more the techniques of a highly trained psychiatrist were used to break petitioner's will in order to get him to say he murdered his parents." 357 U.S. at 559. The confession and others given subsequently by defendant were all held involuntary and thus constitutionally invalid.

The Court below did not mention either of these holdings, both of which were cited to it. Instead, the Court below argued that petitioner was not intimidated because after looking at the hairs through a microscope, he denied the hairs matched, 342 F.2d at 654 (IV R. 389). Petitioner's exact words were, "Them hairs don't match. . . . Them hairs don't belong to me" (IV R. 95). Petitioner was a cab driver who had not finished high school. What were his qualifications to judge the hairs? What weight would the jury

have given his testimony? The hair question must be viewed in the context of other pressure tactics employed by the police.

One device after another was employed to erode the will of petitioner. Over and over he asked to see his family. There is no doubt that petitioner's repeated requests to call his family was to secure their advice and encouragement and looked to the obtaining of counsel. His parents were making efforts to locate their son and had contacted counsel. Not until after the confession was obtained were they allowed to see petitioner (IV R. 218 and 287) and was counsel allowed to see petitioner (IV R. 290).

Not only did the police refuse to permit petitioner to see his family, but what was worse, they used these very requests as levers to weaken his will. Each request was met with the untrue answer that his parents were through with him. The sheriff told him falsely, on November 29, "Your mother and dad don't want to have nothing to do with you." Neither this statement nor similar statements were denied by the prosecution. Further, there was the reprehensible, because false, representation to petitioner that the authorities regarded him mentally ill. There is no dispute on this point. The police themselves so testified. The undoubted inference to be drawn, and the one petitioner drew, was that if he would confess he would be treated as a mentally ill person.[10]

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[10] Despite the stratagems employed against petitioner, when he made an effort to show their impact on him, he was rebuffed. At the 1956 trial, when of course the facts respecting the hair were unknown to him, petitioner made an offer of proof that a psychiatrist would testify that in order to obtain temporary relief from questioning petitioner, under slight inducement and pressure would have signed the purported confession without regard to whether he was innocent or guilty and without regard to whether it was

We believe that holding petitioner incommunicado, coupled with the other circumstances of his detention, rendered the confession void. Here the record is uncontroverted that petitioner was held incommunicado 52 hours; in *Haynes* v. *Washington*, 373 U.S. 503, 10 L. Ed.2d 513 (1963), only 16 hours of incommunicado detention before the first confession was held to make the confession involuntary. There the police refused to permit defendant to call his wife until he had confessed. Moreover, there, there was independent evidence of guilt; here, of innocence. *Lynumn* v. *Illinois*, 372 U.S. 528, 9 L. Ed.2d 922 (1963), rejected a confession where defendant was told that state financial aid for her children would be cut off if she did not cooperate. See also *Culombe* v. *Connecticut*, 367 U.S. 568 (1961); *Turner* v. *Pennsylvania*, 338 U.S. 62 (1949). The coercive effect of being cut off from family and friends, even upon a ship captain, was long ago recognized. *Bram* v. *U. S.*, 168 U.S. 532 (1897). (See also *U. S. ex rel. Kemp* v. *Pate*, 359 F.2d 749 (C.A. 7th, 1966) and the facts recited in 240 F. Supp. 696. (Confession involuntary where result of holding incommunicado for 28 hours with denial of request to see family.))

All of these events—the lie about the hair, the holding incommunicado, the lie about the parents—should be considered in the light of four hours of sleep after arrest, the bull pen, six to eight hours of examination and interroga-

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true or false. The trial court rejected the offer of proof and the Supreme Court of Illinois affirmed (148 N.E. 2d 455 at 465). In the first habeas corpus proceedings the Court of Appeals affirmed the ruling of the District Court that refusal to admit such testimony was not a denial of due process. (*Miller* v. *Pate*, 300 Fed. 2d 414 at 418.) Cf. *U. S. ex rel. Robinson* v. *Pate*, 345 F.2d 691 (C.A. 7th 1965).

tion, three to five hours of sleep, the bull pen, the line up and then again seven hours of interrogation.

## Conclusion

The record before this Court is saturated with injustice. The foregoing pages detail only constitutional deprivations recently uncovered. But there were many others. Undisputed facts known to the prosecution contradicted events recited in the confession and the prosecution's theory. The constitutional violations served to blot out these grave weaknesses of the prosecution's case. But they should be illuminated here because they are part in the background against which the constitutional violations occurred.

1. The confession, supposedly a detailed recounting of events prior to, during and after the crime, failed to lead the prosecution to any corroborating physical evidence. The jacket and shorts mentioned had already been found by the police. (Yet, the prosecution in closing argument to the jury (IV R. 375) wrongfully stated that the jacket was found because the police went to look where the confession says it was discarded.)

2. The jacket was never identified by anyone as petitioner's even though the prosecution made strenuous efforts to make such an identification. Mrs. Curry failed to identify it (I R. 260, 347). Lawrence Johns, petitioner's employer, categorically denied that it could have been petitioner's (II R. 887-8).

3. There was persuasive evidence at the trial that the shorts could not have been his. This evidence was strength-

ened in 1963 by Mrs. Baxter. She testified that petitioner wore only boxer shorts. Further, an expert witness testified in the District Court that the jockey shorts would not have fit petitioner.

4. What about the statement in the confession that petitioner threw the soiled bundle of clothes into the boxcar of a passing train at Maple Street and the tracks?

This statement was known to the prosecution to be false. The tracks were those of the Chicago, Burlington & Quincy Railroad. There was no train on these tracks at the time at which petitioner allegedly threw his clothing into an empty boxcar (IV R. 208-9). The prosecution knew this from trial testimony. Yet in final argument to the jury it wrongly stated there was such a train (IV R. 367).

5. What about the time problem? According to the confession between 5:15 and 5:45 p. m. petitioner was in Carver and Denny Cleaners, returned to his room, changed clothes, wrapped up the soiled clothes, went to Van Buren flats, tried unsuccessfully to retrieve the shorts, went to Second and Maple to dispose of the bundle and returned to his room where he still had time to "stay" until 5:45 p. m. A crowded half hour. But he did other things *and the prosecution knew he did*: the prosecution knew that he had had supper at the Maid Rite some time after 5:00 p. m. (III R. 1117) and that he was at Lewis's Pharmacy from 5:25 to 5:30 p. m.

6. There is further the nearly incredible fact that according to the confession he walked all about Canton from

4:00 p. m. to 5:15 p. m. wearing a bloody jacket. The crime was known at 4:32 p. m. If this were true, where are the scores of witnesses who would have seen him that Saturday afternoon soaked in the marks of his crime?

7. And what about the clothes he supposedly picked up at Carver and Denny cleaners? According to the confession these were thrown in the river at Pekin. Why? There was no blood on them. Here too the confession fails of corroboration because the clothes were never found in the river.

8. Even the manner in which the crime was committed is not substantiated by the known facts:

The confession states "Then I struck her with my hand. Then she fell and hit her head on a cement block." The prosecution knew, or should have known, that this statement was false. At the 1956 trial, the prosecution offered the testimony of Dr. David A. Bennett to describe the condition of the victim at death (IV R. 36-7). In his testimony Dr. Bennett described three separate and distinct fractures to the skull of the victim. At the hearing below, it was established that the injuries inflicted upon skull of the victim could not have occurred in the manner described in the confession (Tes. of Dr. Webb, I R. 127-140).

When petitioner entered the grim battle for his life the prosecution suppressed scientific evidence favorable to petitioner; it denied him an opportunity to ascertain the scientific facts himself; it came forth with a witness it knew was false; it permitted her to lie on the stand; it thwarted the efforts of petitioner to produce witnesses favorable to him —and now it claims petitioner had a fair trial.

The prosecution did not hesitate to deprive petitioner or witnesses. But when petitioner's counsel attempted to interview a prospective prosecution witness, he was subjected to a cruel attack. The word of a person known to be unreliable was accepted for an affidavit asserting calumnies against him. A contempt petition was presented without notice. The petition was filed a month before the trial, and yet hearing on the petition for a rule was set only 4 days before the trial. Counsel for petitioner received a barrage of unfavorable publicity.

We recall Article 5 of Canons of Professional Ethics of the American Bar Association:

> "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."

We assert petitioner's constitutional rights were cruelly violated. The acts of the prosecution should not be condoned by this Court in any case and certainly not in a

capital case. We ask that the judgment of the Court of Appeals be reversed and that of the District Court affirmed.

Respectfully submitted,

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